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IN THE

# Supreme Court of the United States

October Term, 1963

## No. 718

GROVE PRESS, INC., a New York corporation,
Petitioner,

vs.

RICHARD E. GERSTEIN, as State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County, and WHELAN DRUG CO., INC., a Florida corporation,
Respondents

**Respondent's Brief and Appendix in Opposition to Petition for Writ of Certiorari to the District Court of Appeal Third District, State of Florida**

JAMES W. KYNES
Attorney General
State of Florida
Tallahassee, Florida

LEONARD R. MELLON
Assistant Attorney General
Miami, Florida

GLENN C. MINCER
Assistant State Attorney
Eleventh Judicial Circuit
Dade County, (Miami) Florida

N. JOSEPH DURANT, JR.
Assistant State Attorney
Eleventh Judicial Circuit
Dade County, (Miami) Florida

GEORGE ORR
Assistant State Attorney
Eleventh Judicial Circuit
Dade County, (Miami) Florida
Counsel for Respondent

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RICHARD E. GERSTEIN, as State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County, and WHELAN DRUG CO., INC., a Florida corporation,

Respondents

**Respondent's Brief and Appendix in Opposition to Petition for Writ of Certiorari to the District Court of Appeal Third District, State of Florida**

The Respondent, Richard E. Gerstein, as State Attorney of the Eleventh Judicial Circuit in and for Dade County, Florida, pursuant to Rule 24, Revised Rules of The Supreme Court of the United States, files this his brief opposing the petition for a writ of certiorari, filed December 31, 1963, in the above-styled cause. The Respondent was the Plaintiff and the Petitioner was one of the Defendants in the Trial Court.

The letter (A. ) refers to the appendix. A copy of the transcript of record was not served upon the Respondent and therefore is not available for reference in this brief. All emphasis supplied.

For explanation and the convenience of this Court, the Respondent has appended hereto the final decree of the Florida trial court, (A. 1); the opinion of the District Court of Appeal, Third District, State of Florida, (A. 4), and portions of Florida Statutes 847.011, prohibiting obscene material, (A. 8).

## OPINION OF THE FLORIDA COURT

This petition seeks to review the opinion of the District Court of Appeal, Third District, State of Florida, dated the 17th day of September, 1963, reported at 156 So.2d 537, attached hereto (A. 4), affirming the final decree of the Circuit Court of the Eleventh Judicial Circuit of Florida in and for Dade County, wherein the trial court adjudged the book "Tropic of Cancer" to be an obscene publication, condemned by Section 847.011, Florida Statutes, (A. 8).

## JURISDICTION

The Petitioner invokes the jurisdiction of the United States Supreme Court under Title 28, United States Code, Section 1257(3). The Respondent says that Title 28, United States Code, Section 1257, when read in pari materia with the appropriate sections of the Florida Constitution, indicates that the Petitioner has misconceived his procedure and improvidently seeks the jurisdiction of this Court.

Title 28, United States Code, Section 1257, states:

> "§ 1257. State Courts; appeal; certiorari
> Final judgments or decrees rendered by the **highest court of a state** in which a decision could be had, may be reviewed by the Supreme Court as follows: (1), (2), (3)." (emphasis supplied)

The Petitioner's contentions that the questionable book is protected by the First Amendment and the Fourteenth Amendment to the United States Constitution and that the Florida obscenity statute was unconstitutionally applied to the book in question have not been presented to, nor passed upon by The District Court of Appeal of Florida, Third District and The Supreme Court of Florida.

Only the Supreme Court of Florida has jurisdiction to hear appeals from trial courts directly "passing upon the validity of a state statute, or a federal statute, or treaty, or construing the controlling provision of the Florida or Federal Constitution". Such appeals when **properly presented** are expressly authorized by Article V, Section 4(2), Florida Constitution (Fla.App. Rules 2.1(5)(a)).

The District Court of Appeal, Third District, State of Florida, is expressly forbidden to entertain appeals from the trial courts which appeals may be taken direct to The Supreme Court (Article V, Section 5(3), Constitution of Florida).

It is important to note that the Petitioner, in The District Court of Appeal of Florida, Third District, expressly disclaimed and waived the constitutional ques-

tions it is attempting to raise for the first time in this Court. By so doing, the Petitioner prevented itself from properly presenting these constitutional questions in the Florida Appellate Courts.

Therefore, the Petitioner should not be permitted to invoke the jurisdiction of The Supreme Court of the United States unless and until he has exhausted the established judicial procedure provided for and sanctioned by the Constitution of the State of Florida, the Florida Appellate Rules, the decisions of The Supreme Court of Florida, and by Title 28, United States Code, Section 1257. (For constitutional direct appeals to The Supreme Court of Florida see State v. Barone, 124 So.2d 490, (Fla.1960); Boyd v. County of Dade, 123 So.2d 323, (Fla.1960); Robinson v. State of Florida, 132 So.2d 3, (Fla.1961).

## THE FLORIDA STATUTE INVOLVED

Section 847.011, Florida Statutes 1961, condemns the publication, distribution and sale of obscene material, provides a remedy and makes it the duty of the State Attorney to enforce this statute (A. 8).

## QUESTIONS PRESENTED FOR REVIEW

1. **Whether the trial court correctly instructed the jury with regard to the legal tests or standards in determining whether the book "Tropic of Cancer" is obscene.**

2. **Whether the Constitutional guarantees of free expression are violated by the application of local (Dade County), rather than national,**

**"contemporary community standards" to the question of whether "Tropic of Cancer" is obscene.**

**3. Whether the petitioner was denied Constitutional guarantees of "freedom of expression" and "due process" by having a jury determine conclusively and as a question of fact that the book "Tropic of Cancer" is obscene.**

**4. Whether the book "Tropic of Cancer" is an obscene book condemned by Section 847.011, Florida Statutes 1961, and therefore not protected by the First and Fourteenth Amendments of the Constitution of the United States.**

## STATEMENT OF THE CASE

The Respondent, Richard E. Gerstein, as State Attorney for the Eleventh Judicial Circuit of Florida, filed a complaint in the Circuit Court of the Eleventh Judicial Circuit of Florida, seeking an injunction against Whelan Drug Co., Inc., a Florida corporation, from the sale and distribution of the book "Tropic of Cancer" written by Henry Miller. The petitioner, Grove Press, Inc., a New York corporation and publisher of the "Tropic of Cancer", petitioned the trial court to intervene as a co-defendant, and this petition was granted. The only issue raised by the pleadings in the trial court was whether "Tropic of Cancer" is an obscene book in violation of Florida Statutes Chapter 847. The trial court submitted the question of whether the book is obscene as defined by the laws of the State of Florida to a duly constituted jury of six persons. This jury, after reading the book

and after hearing testimony offered by the Petitioner and the Respondent relating to "contemporary community standards" and to the alleged literary and social merit of the book in question, returned a special verdict of guilty. The trial court thereupon entered a final decree upholding the constitutionality of the statute in question and adjudging "Tropic of Cancer" to be obscene.

An appeal was taken by the Petitioner to the District Court of Appeal of Florida, Third District. In its assignments of error, the Petitioner questioned the constitutionality of the Florida statute governing obscenity, but the Petitioner subsequently abandoned this attack upon the statute. The appellate court considered the appeal on the merits and affirmed the final decree of the trial court.

## ARGUMENT

### 1. THE TEST FOR OBSCENITY

The transcript of record in this cause will show that the trial court's charge to the jury included the following instruction:

> "In determining whether or not this book, Tropic of Cancer, is obscene, you must apply the test laid down by our appellate courts and the Florida Legislature, which reads as follows: Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

Based on this instruction, it is submitted that the jury rendered its verdict and the trial court rendered its decision pursuant to said verdict clearly and specifically within the framework of the legal requirements set forth in the case of **Roth v. U.S.**, (1957), 354 U.S. 476. And therefore, since the proper test of obscenity was applied in the trial court, the final decree in question should not be disturbed. This argument is supported by a decision of the Supreme Court of Wisconsin in the case of **State v. Chabot**, (1961), 106 N.W. 2d 286, wherein the Court reasoned as follows:

> "In this case the trial court adopted and applied to the exhibits the standard set forth in the Roth case as the test of obscenity. The court was the finder of the fact, appellant having waived trial by jury. Thus, it was the 'exclusive judge of what the common conscience of the community is . . . as a whole.'
>
> • • • • •
>
> "The trial court stated in its decision:
>
> 'The dominant theme of each item of material noted, taken as a whole, to the average person, applying contemporary community standards, appeals to prurient interest within the meaning of the rule of the Roth case and is obscene. . . .'
>
> "Appellant calls attention to several cases involving obscenity convictions since the Roth case, where certiorari was granted by the United States Supreme Court and the judgments re-

versed without opinion, citing the Roth Case. Sunshine Book Co. v. Summerfield, (1958), 355 U.S. 732, 78 S.Ct. 365, 2 L.ED. 2d 352; One, Inc. v. Olesen, (1958), 355 U.S. 371, 78 S.Ct. 365, 2 L.Ed 2d 352. . . It is argued that the effect of these decisions is to change the standard enunciated in the Roth case. Analysis of the cases discloses that the tests of obscenity there applied were not the test set forth and approved in the Roth case. It is apparent that the United States Supreme Court, in citing the Roth case in each such reversal, has insisted that the test to be applied is that approved in the Roth case."

It is the Petitioner's contention that the test for obscenity applied by the jury and the trial judge was incomplete in that they failed to consider whether or not the book "Tropic of Cancer" is "patently offensive". This contention is based on an opinion of this court in the recent case of **Manuel Enterprises, Inc. v. Day**, (1962), 370 U.S. 478. There is no question that this Court ruled in that case that obscerity under the federal st ute requires proof of two elements: (1) patent offensiveness; and (2) "prurient interest" appeal. However, it is submitted that this Court a o ruled that the two elements are so closely inter-related that it is unnecessary to prove the patent offensiveness unless the publication in question is limited in its appeal to a particular class—such as homosexuals. This contention is based on the following reasoning of the Supreme Court at page 486 of 370 U.S.:

"Obscenity under the federal statute thus requires proof of two distinct elements: (1) patent

> offensiveness; and (2) "prurient interest" appeal. Both must conjoin before challenged material can be found "obscene" under §1461. In most obscenity cases, to be sure, the two elements tend to coalesce, for that which is patently offensive will also usually carry the requisite "prurient interest" appeal. It is only in the unusual instance where, as here, the prurient interest" appeal of the material is found limited to a particular class of persons that occasion arises for a truly independent inquiry into the question whether or not the material is patently offensive."

Since the appeal of subject book "Tropic of Cancer" is not limited to a particular class, it is submitted that there was no need for the jury to determine its patent offensiveness.

In any event, it is apparent from the record in this case that the trial court, in addition to charging the jury on the "prurient interest" test, also instructed the jury to determine the question of whether or not "Tropic of Cancer" is patently offensive, for the record will reflect that the trial court instructed the jury as follows:

> "The test in each case is the effect of the book, considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community. This book must be judged as a whole, in its entire context, and you are not to consider detached or separate portions in reaching a conclusion. You

> judge the book which has been put in evidence by present-day standards of the community. **You may ask yourselves does it offend the common conscience of the community by present-day standards."**

In giving this instruction, it is submitted that the Court was telling the jury that in deciding the "prurient interest" question, the jury must also determine whether the book "Tropic of Cancer" was offensive to the moral standards of this community, or in other words, whether the said book was patently offensive. It is apparent, therefore, that the tests applied by the jury were in conformity with the tests for obscenity promulgated by this Court.

## 2. THE APPLICATION OF LOCAL, RATHER THAN NATIONAL, STANDARDS OF DECENCY

The Petitioner contends that the standards to be applied by the trier of fact in determining whether a book is obscene must be national rather than local, standards. This argument might have some merit if this Court in the **Roth** case had limited the "prurient interest" test to "contemporary standards" rather than "contemporary community standards". It is submitted that the inclusion of the word "community" indicated that this Court was of the opinion that the standards to be considered are those of the locality in which the particular book is being distributed. This is particularly true if we accept the proposition that whether a given book is obscene is best determined by a jury. As Mr. Justice Brennan pointed

out in his dissenting opinion in **Kingsley Books v. Brown**, 354 U.S. 436, at 448:

> "The Jury represents a cross-section of the community and has a special aptitude for reflecting the view of the average person. Jury trial of obscenity therefore provides a peculiarly competent application of the standard for judging obscenity which, by its definition, calls for an appraisal of material according to the average person's application of contemporary community standards."

It is obvious that the average juror in Dade County, Florida could not possibly apply national, contemporary standards of morality for the simple reason that the said average juror is almost completely unaware of moral standards outside of his own community. Indeed, there is such a plethora of ideas and philosophies which compose present-day societies, that to extract a particular community standard from this mass is an extremely difficult task for any jury to perform, even when limited to a particular locality. If the task is enlarged to include the moral standards of the entire nation, then the jury's task becomes insurmountable, and the Roth test is rendered inoperative.

It is submitted that the only occasion for considering national moral standards is when the federal statutes governing obscenity are involved. In **Manual Enterprises v. Day**, 370 U.S. 478, at 488, Mr. Justice Harlan, speaking for this Court, said:

> "There must first be decided the relevant 'com-

> munity' in terms of whose standard of decency the issue must be joined. We think that the proper test under this federal statute, reaching as it does to all parts of the United States whose population reflects many different ethnic and cultural backgrounds, is a national standard of decency."

Perhaps the most cogent argument in favor of applying local standards in the enforcement of State obscenity statutes may be seen in the dissenting opinion of Mr. Justice Harlan in the **Roth** case (354 U.S. at p. 505), which reads in part as follows:

> " * * * It has often been said that one of the great strengths of our federal system is that we have, in the forty-eight States, forty-eight experimental social laboratories. State statutory law reflects predominantly this capacity of a legislature to introduce novel techniques of social control. The federal system has the immense advantage of providing forty-eight separate centers for such experimentation.' Different States will have different attitudes toward the same work of literature. The same book which is freely read in one State might be classed as obscene in another. And it seems to me that no overwhelming danger to our freedom to experiment and to gratify our tastes in literature is likely to result from the suppression of a borderline book in one of the States, so long as there is no uniform nation-wide suppression of the book, and so long as other States are free to experiment with the same or bolder books.

"Quite a different situation is presented, however, where the Federal Government imposes the bar. The danger is perhaps not great if the people of one State, through their legislature, decide that "Lady Chatterley's Lover" goes so far beyond the acceptable standards of candor that it will be deemed offensive and non-sellable, for the State next door is still free to make its own choice. At least we do not have one uniform standard. But the dangers to free thought and expression are truly great if the Federal Government imposes a blanket ban over the Nation on such a book. The **prerogative of the States to differ on their ideas of morality will be destroyed, the ability of States to experiment will be stunted.** The fact that the people of one State cannot read some of the works of D. H. Lawrence seems to me, if not wise or desirable, at least acceptable."

### 3. THE CONCLUSIVENESS OF THE JURY VERDICT

The Petitioner contends that it was denied "due process of law" by having a jury determine conclusively that the book "Tropic of Cancer" is obscene. It is apparently the Petitioner's position that the book is entitled to a trial de novo in the appellate courts of Florida as well as in this Court. This argument overlooks the fact that this Court, in the Roth case, rather summarily approved the findings of the courts below on the issue of obscenity, and therefore, it is submitted that the majority opinion in the Roth case supports the principle that the question of obscenity is one of fact for the jury. In **Kahm** v.

**United States**, 300 F.2d 78 (1962), Circuit Judge Pope reasoned as follows:

> "Appellant says that the question of obscenity is one of law, and not of fact, and hence not a matter properly to be submitted for jury determination; —that what is here involved is his claim of constitutional right, as a part of his First Amendment freedoms to distribute this literature. He says this can only be adjudged as a matter of law. In view of the Roth case and its express statement that the trial court in that case 'followed the proper standard' and 'used the appropriate definition of obscenity' in its instructions to the jury, we think it is idle to contend that the question of obscenity was not properly submitted to the jury in this case."

We agree, of course, that where there is a claim that constitutional rights were denied in the trial court, then it is incumbent upon the appellate court to examine the evidential basis on which the factual conclusions of the jury or trial court were founded. It is submitted that this examination was performed by The District Court of Appeal of Florida, Third District, for in its opinion (A. 7), we find the following statement:

> "The finding of obscenity has not been shown by the appellant to be contrary to the law or to the manifest weight or preponderance of the evidence."

Whatever the courts may say about obscenity being a fact question for the jury, they are acutely conscious of

the issue's constitutional overtones, and, for this reason, not infrequently feel constrained to add their finding to that of the jury. Indeed, the trial court in the case at bar made such a finding in its final decree (A. 2). Such an explanation seems to fit the case of **People v. Smith**, 327 p. 2d 639, in which the court said:

> "Under any test, the book concerned in this prosecution was properly held to be obscene by the trial court, and we share such a conclusion upon our independent view of the evidence, if that be necessary in view of the assertion of constitutional right, though such a right is clearly nonexistent. (Citing Roth). Obscenity is not constitutionally protected. The 'community standard' is, as in other criminal matters, to be determined by the trier of fact."

If the Petitioner is correct in its contention that every questionable book is entitled to a trial de novo in the appellate courts, then this Court must become a National Board of Censors. This possibility was strongly objected to by Mr. Justice Black in his concurring opinion in **Kingsley Int. Pic. Corp v. Regents of N.Y.U.**, 360 U.S. 684, at 689, which reads in part as follows:

> "If despite the constitution, however, this Nation is to embark on the dangerous road of censorship, my belief is that this Court is about the most inappropriate Supreme Board of Censors that could be found. So far as I know, judges possess no special expertise providing exceptional competency to set standards and to supervise the private morals of the Nation. In addition, the

Justices of this Court seem especially unsuited to make the kind of value judgments—as to what movies are good or bad for local communities—which the concurring opinions appear to require. We are told that the only way we can decide whether a State or municipality can constitutionally bar movies is for this Court to view and appraise each movie on a case-by-case basis. Under these circumstances, every member of the Court must exercise his own judgment as to how bad a picture is, a judgment which is ultimately based at least in large part on his own standard of what is immoral. The end result of such decisions seems to me to be a purely personal determination by individual Justices as to whether a particular picture viewed is too bad to allow it to be seen by the public. Such an individualized determination cannot be guided by reasonably fixed and certain standards. Accordingly, neither States nor moving picture makers can possibly know in advance, with any fair degree of certainty, what can or cannot be done in the field of movie making and exhibiting. This uncertainty cannot easily be reconciled with the rule of law which our Constitution envisages."

### 4. "Tropic Of Cancer" Is An Obscene Book

It is apparently the Petitioner's position that even though a questioned book may be obscene, if it has the slightest redeeming social or literary importance, it is then entitled to the full protection of the constitutional guaranties. It is submitted that this contention is not

supported by the law, as evidenced by the following pronouncements in the **Roth** case, 354 U.S., at 486:

> "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, **unless excludable because they encroach upon the limited area of more important interests.** But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 States, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956. This is the same judgment expressed by this Court in Chaplinsky v. New Hampshire, 315 U. S. 568, 571-572, 62 S. Ct. 766, 769, 86 L.Ed. 1031:
>
> > " * * * There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. **These include the lewd and obscene * * . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality * * *.**

> We hold that obscenity is not within the area of constitutionally protected speech or press." (Emphasis supplied.)

Based on the **Roth** case, it is submitted that if the dominant theme of a book falls within the test for obscenity, then the book is not entitled to the protection afforded free speech, even though it may have some slight redeeming social or literary importance.

It is the Respondent's position that even though "Tropic of Cancer" may have some slight redeeming social or literary importance, it is still hard-core pornography and is obscene no matter what test for obscenity is applied to it. This position is supported by several decisions in which the Courts have been called upon to determine whether the book in question is obscene. For example, in the case of **U. S. v. Two Obscene Books**, 99 F.Supp. 760, District Judge Goodman made the following analysis of "Tropic of Cancer":

> "The Claimant here, as well as some of the critics and reviewers who speak in his behalf, have presented a species of "confession and avoidance" defense of Henry Miller. The many long filthy descriptions of sexual experiences, practices and organs are of themselves admitted to be lewd. They are sought to be justified by the claim that the books as a whole have an artistic pattern, into which the obscene and scatological portions fit as part of a whole literary mosaic. But I must conclude that this is mere sophistry. The filthy scatological portions are written in a bluntly different and distinct style from the pre-

tentious metaphysical reflective manner of writing otherwise. Thus the conclusion is justified that either the alleged literary ability of the author deserted him or that he had his eye on "the box office."

"It may be that the modern trend towards frankness in sexual matters has influenced the viewpoint of claimant and the critics who espouse the cause of Miller. Certainly, the theatre, the moving pictures, other similar media and Mr. Kinsey may have affected our attitude as to such matters. It is sufficient to say, however, that the many obscene passages in the books have such an evil stench that to include them here in footnotes would make this opinion pornographic. For example, there are several passages where the female sexual organ and its functions are described and referred to in such detailed vulgar language as to create nausea in the reader. If this be importable literature, then the dignity of the human person and the stability of the family unit, which are the cornerstones of our system of society, are lost to us."

In a dissenting opinion by Chief Justice Wilkens and Justices Williams and Kirk of the Supreme Judicial Court of Massachusetts, in the case of **Attorney General v. Book Named "Tropic of Cancer"**, 184 N.E. 2d 328, we find the following description:

"The book is pitched at the nadir of scatology. Indeed, its low level is relied upon as engulfing all obscene effect. We cannot bring ourselves

to accept the thesis that the book, thus indicted, becomes endowed with constitutional protection. Its detailed and sordid sex episodes, persistently inserted at intervals in what passes for narrative, leave an outweighing staccato impression. In our opinion it should be classified as pornography."

And finally, in what must be termed the leading case in support of the contention that "Tropic of Cancer" is hard-core pornography, we refer this Court to the case of **People v. Fritch,** 192 N.E.2d 713. At pages 716 and 717 in the opinion written by Judge Scileppi for the Court of Appeals of New York, is the following legal analysis of the book in question:

"In the exercise of our duty to make an independent constitutional appraisal, we have read the book carefully and conclude that it is nothing more than a compilation of a series of sordid narrations dealing with sex in a manner designed to appeal to the prurient interest. It is devoid of theme or ideas. Throughout its pages can be found a constant repetition of patently offensive words used solely to convey debasing portrayals of natural and unnatural sexual experiences. It is a blow to sense, not merely sensibility. It is, in short, "hard-core pornography", dirt for dirt's sake (United States v. One Book Called "Ulysses", D.C., 5 F. Supp. 182), and dirt for money's sake (Kinsley Intern. Pictures Corp. v. Regents of University of State of New York, 360 U.S. 684, 692, 79 S.Ct. 1362, 3 L.Ed.2d 1512). We see no reason for adopting an unrealistic

appraisal of the nature of this book when there is such overwhelming proof of its incompatability with the current moral standards of our community. If, as the County Court held, this book is not obscene as a matter of law, it is difficult to conceive when, if ever, a book can be held to be obscene under any established legal standard.

"Defendants contend that even if "Tropic of Cancer" is obscene when judged by the established tests, it is nevertheless, under the Roth case, supra, entitled to protection because it has "substantial literary merit". We do not interpret Roth, or any other authority, as establishing any such rule of law. Defendants place reliance upon the court's statement in Roth that "implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance" (354 U.S. supra, p. 484, 77 S.Ct. p. 1309, 1 L.Ed.2d 1498). But it does not follow that the converse is true; indeed, if such were the case the holding in Roth would be vitally eroded, for the test as pronounced there is the appeal to the prurient interest of the average person in the contemporary community. It does not follow, then, that because an alleged work of literature does not appeal to the prurient interest of a small group of intellectuals that it is not obscene under the prurient interest, or for that matter any other legal test of obscenity. This would permit the substitution of the opinions of authors and critics for those of the average person in the contemporary community.

> The fact that a few literary figures have commented favorably on this book and have lent it their prestige does not expunge from its pages the flagrantly obscene and patently offensive matter which dominates the book as a whole.'

In a concurring opinion in the **Fritch** case (492 N.E. 2d at 719), Chief Judge De[illegible]nd wrote the following diatribe against "Tropic of Cancer":

> "If this book had not been written by a recognized author, if it did not contain some "good writing" and if it were not approved by well-known reviewers, no one, I venture, would deny that it is obscene by any conceivable definition, narrow or tolerate. Its own cover blurb boasts of its "unbridled obscenity". From first to last page it is a filthy, cynical, disgusting narrative of sordid amours. Not only is there in it no word or suggestion of the romantic, sentimental, poetic or spiritual aspects of the sex relation, but it is not even bawdy sex or comic sex or sex described with vulgar good humor. No glory, no beauty, no stars—just mud. The whole book is "sick sexuality", a deliberate, studied exercise in the depiction of sex relations as debasing, filthy and revolting. On page 483 of 370 U.S., on page 1434 of 82 S.Ct., 8 L.Ed. 2d 639, Justice Harlan's opinion in Manual Enterprises, Inc. v. Day quotes the New International Dictionary's long series of definitions of "obscene". It is a remarkable fact that "Tropic of Cancer" fits every single one of those numerous meanings."

## CONCLUSION

In his concurring opinion in **People v. Fritch**, 192 N.E.2d 713, at 719, Chief Judge Desmond, after finding "Tropic of Cancer" to be hard-core pornography, made the following statement, which is particularly appropriate in the case at bar:

> " . . . 'community standards' are the subjective reactions of the citizenry of a place or region. If we are to use community standards as a test, the only feasible testing method is by submission to a jury as was recognized by our own court long ago in People v. Pesky, 254 NY 373, 173 NE 227. Of course a jury cannot repeal the First Amendment but when a jury (as here) makes a finding of obscenity as to material not unreasonably deserving that epithet, there can be no violation of the Constitution. Where the book taken as a whole can under permissible constitutional standards be reasonably considered by men of ordinary prudence to be beyond the pale of contemporary notions of rudimentary decency (paraphrased from Manual Enterprises, 370 U.S., supra, p. 489, 82 S.Ct. p. 1438, 8 L.Ed. 639) then a jury verdict of 'guilty' violates no right."

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted.

By Glenn C. Mincer

JAMES W. KYNES
Attorney General
State of Florida
Tallahassee, Florida

LEONARD R. MELLON
Assistant Attorney General
Miami, Florida

GLENN C. MINCER
Assistant State Attorney
Eleventh Judicial Circuit
Dade County, (Miami) Florida

N. JOSEPH DURANT, JR.
Assistant State Attorney
Eleventh Judicial Circuit
Dade County, (Miami) Florida

GEORGE ORR
Assistant State Attorney
Eleventh Judicial Circuit
Dade County, (Miami) Florida
Counsel for Respondent

## CERTIFICATE OF SERVICE

I, GLENN C. MINCER, Assistant State Attorney, Counsel for Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on March 13, 1964, I served copies of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari to the District Court of Appeal, Third District, State of Florida, on the Petitioner by mailing a copy thereof in a duly addressed envelope with postage prepaid to each of the following, to-wit, EDWARD DE GRAZIA, 1001 Connecticut Ave., N. W., Washington 36, D.C.; RICHARD YALE FEDER, 100 Biscayne Boulevard South, Miami 32, Florida; TOBIAS SIMON, c/o Fla. Civil Liberties Union, 223 S.E. 1st Street, Miami 32, Florida, and IRMA ROBBINS FEDER, 17491 N.E. 5th Avenue, North Miami Beach, Florida.

Glenn C. Mincer

GLENN C. MINCER
Assistant State Attorney
Eleventh Judicial Circuit
Dade County, (Miami) Florida
Counsel for Respondent

## APPENDIX

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY — IN CHANCERY NO. 61C 11673

THE STATE OF FLORIDA, EX REL
RICHARD E. GERSTEIN,
As State Attorney for the Eleventh Judicial Circuit of Florida in and for Dade County, Florida,

Plaintiff,

vs.

WHELAN DRUG CO., INC.,
a Florida corporation and
GROVE PRESS, INC.,
a New York corporation,

Defendants.

### FINAL DECREE

(Filed October 16, 1962)

This cause arises out of the complaint of Richard E. Gerstein, as State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County, seeking an injunction against Whelan Drug Co., Inc., a Florida corporation, from the sale and distribution of the book "Tropic of Cancer" written by Henry Miller. Grove Press, Inc., a New York corporation and publisher of the aforesaid "Tropic of Cancer" written by Henry Miller, petitioned this Court to intervene as a co-defendant. This petition was granted. There are no disputed issues of fact except the defendants contend the book "Tropic of Cancer" by Henry Miller is not obscene material in violation of Florida Statutes Chapter 847. The book "Tropic

of Cancer" written by Henry Miller was sold, offered for sale and disseminated by the defendant Whelan Drug Co., Inc., a Florida corporation, in Dade County, Florida, as alleged in the Bill of Complaint. Within the jurisdiction of this Court the defendant did publish the aforesaid "Tropic of Cancer" written by Henry Miller and has voluntarily submitted itself to the jurisdiction of this Court. This Court submitted the question of whether or not the book was obscene as defined by the laws of the State of Florida to a duly constituted jury of six persons. This jury having read the book, having heard testimony offered by the complainants and the defendants, and after argument of counsel returned a special verdict of guilty. That is, that the aforesaid book "Tropic of Cancer" was obscene. Therefore the Court finds as follows:

1. That the plaintiff, Richard E. Gerstein, is the State Attorney for the Eleventh Judicial Circuit in and for Dade County, Florida, and is authorized by the laws of Florida, to institute this action.

2. That the defendant, Whelan Drug Co., Inc., a Florida corporation, did sell, offer for sale and disseminate in Dade County the book "Tropic of Cancer" written by Henry Miller, and that the defendant, Grove Press, Inc., a New York corporation, was the publisher of the aforesaid book "Tropic of Cancer" by Henry Miller, and has voluntarily submitted itself to the jurisdiction of this Court.

3. That the said book "Tropic of Cancer" by Henry Miller was obscene in that to the average person applying the contemporary Dade County Community standards and taking the dominant theme of the whole book "Tropic

of Cancer" by Henry Miller would appeal to the prurient interest of such average reader in Dade County, Florida.

4. That this finding that the said book "Tropic of Cancer" by Henry Miller, which was introduced in evidence without objection, was obscene as determined by a jury of six Dade County residents by a special verdict.

5. The Court further finds that Chapter 847 F.S. is not unconstitutional nor in violation of the Thirteenth Declaration of Right of the Florida Constitution nor by the First Amendment to the Constitution of the United States.

WHEREFORE, IT IS ORDERED AND DECREED:

1. That the defendants, Whelan Drug Co., Inc., a Florida corporation, and Grove Press Inc., a New York corporation, separately and severally be and they are each hereby permanently prohibited and enjoined from printing, publishing, disseminating, selling, lending, giving away, distributing, transmuting, showing, transmitting or offering to sell, lend give away, distribute, transmit, show or transmute the book "Tropic of Cancer" by Henry Miller or any facsimile or copy of the book "Tropic of Cancer" by Henry Miller within the jurisdiction of this Court.

2. That the defendants, Whelan Drug Co., Inc., a Florida corporation, and Grove Press, Inc., a New York corporation, separately be and they are each thereby permanently prohibited and enjoined from bringing, importing or transporting in or into Dade County, Florida,

by mail, express company nor private carrier or any means whatsoever, the aforesaid book "Tropic of Cancer" by Henry Miller, or any facsimile or copy thereof.

3. That the Court retains jurisdiction of this cause and the parties in such matters hereof for such other and further proceedings as may be required by law or equity.

DONE AND ORDERED in the Courthouse at Miami, Dade County, Florida, this 16 day of October, 1962.

HAROLD R. VANN
Circuit Judge

156 So.2d 537:

GROVE PRESS, INC.,
a New York corporation,

Appellant,

vs.

THE STATE OF FLORIDA, ex rel.
RICHARD E. GERSTEIN,
as State Attorney for the
Eleventh Judicial Circuit of Florida, and
WHELAN DRUG CO., INC.,
a Florida corporation,

Appellees.

No. 62-710

District Court of Appeal of Florida
Third District

September 17, 1963

Richard E. Gerstein, State Attorney, Joseph Durant and George Orr, Assistant State Attorneys, Richard W. Ervin, Attorney General, and Herbert P. Benn, Assistant Attorney General, for STATE; Shapiro & Fried, for Whelan Drug Co., appellees.

Tobias Simon; Irma Robbins Feder; Richard Yale Feder, for appellant.

Before BARKDULL, C. J. and CARROLL and HORTON, JJ. CARROLL, Judge

Proceeding under the Florida obscenity statute, Chapter 847, Fla.Stat.,F.S.A. the state attorney sought and obtained an injunction with reference to the book "Tropic of Cancer", written by Henry Miller, restraining the defendant dealer and the intervenor, the publisher Grove Press, Inc., from selling and distributing the book here and from bringing it into this state. The publisher answered denying obscenity and contending the statute violated state and federal constitutional guarantees of due process of law and freedom of speech. The question of the obscenity of the book under the statute was submitted to a jury which found it obscene, prompting the final decree from which the intervenor-publisher appealed.

A holding that the statute was valid made the decision one appealable to the Supreme Court. In assignments of error and in its brief, in addition to contending the finding of obscenity was against the weight of the evidence, the appellant challenged the chancellor's ruling on the validity of the statute and contended the statute as applied to the publication was unconstitu-

tional. But prior to argument appellant withdrew its claim of invalidity and unconstitutionality of the statute. This court, being uncertain as to the effect of that action of the appellant upon the appellate jurisdiction of the Supreme Court, transferred the appeal to that court. The Supreme Court ruled against jurisdiction and returned the case. Thereafter, this court considered the appeal on the merits and heard argument. We now affirm the decree.

The book, "The Tropic of Cancer" has been judged as to the obscenity in a number of jurisdictions with differing results. Generally, those courts have discussed at some length the filth which is packed into the work and in its narration of a procession of sexual episodes. We see no need to so elaborate. The test of obscenity under the Florida statute and the effect of a trial court's finding of obscenity thereunder were stated by this court in Tralin v. Gerstein, Fla.App.1963, 151 So.2d 19, 20, as follows:

> "* * * The test of obscenity is whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to the prurient interest, that is to say, arouses lascivious or lustful thoughts. Roth v. United States, supra; Rachleff v. Mahon, supra; see also 847.011, supra. it is for the trier of the facts to determine the contemporary community standards by which obscenity should be measured and, applying these standards and the test set forth above, to determine whether or not a given publication is in fact obscene." Gerstein

v. 'Pleasure Was My Business,' Fla.App.1961, 136 So.2d 8; Rachleff v. Mahon, supra; State v. Clein, Fla.1957, 93 So.2d 876. An appellate court will not substitute its judgment on these questions for that of the trier of fact absent a compelling reason to do so apparent in the record. See Rachleff v. Mahon, supra."

The record discloses the chancellor approached the decision on a basis which was consistent with the standard previously announced by the Florida courts and with the tests set forth in the Roth and Day cases. For those reasons, and because the question of validity of the statutes was waived and the decision found not to involve constitutional construction, we consider the jury's decision conclusive on the matter. The finding of obscenity has not been shown by the appellant to be contrary to the law or to the manifest weight and preponderance of the evidence.

Affirmed.

PERTINENT PARTS OF § 847.011, F.S. 1961

847.011 Prohibition of certain acts in connection with obscene, lewd, etc., materials; penalty.—

(1)(a) A person who knowingly sells, lends, gives away, distributes, transmits, shows or transmutes, or offers to sell, lend, give away, distribute, transmit, show or transmute, or has in his possession, custody, or control with intent to sell, lend, give away, distribute, transmit, show transmute, or advertise in any manner, any obscene, lewd, lascivious, filthy, indecent, immoral, sadistic, or masochistic book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion picture film, figure, image, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument of indecent or immoral use, or purporting to be for indecent or immoral use or purpose; or who knowingly designs, copies, draws, photographs, poses for, writes, prints, publishes, or in any manner whatsoever manufactures or prepares any such material, matter, article, or thing of any such character; or who knowingly writes, prints, publishes, or utters, or causes to be written, printed, published, or uttered, any advertisement or notice of any kind, giving information, directly or indirectly, stating, or purporting to state, where, how, of whom, or by what means any, or what purports to be any, such material, matter, article, or thing of any such character can be purchased, obtained, or had; or who in

any manner knowingly hires, employs, uses, or permits any person to do or assist in doing, either knowingly or innocently, any act or thing mentioned above, is guilty of a misdemeanor and shall be punished by imprisonment in the county jail not exceeding one year or by fine not exceeding $1,000.00, both. A person who, after having been convicted of a violation of this section, thereafter violates any of its provisions, is guilty of a felony and shall be punished by imprisonment in the state prison not exceeding five years or in the county jail not exceeding one year or by fine not exceeding $10,000.00, or by both such fine and imprisonment.

• • • • •

(7) (a) The circuit court has jurisdiction to enjoin a threatened violation of this section upon complaint filed by the state attorney, county solicitor, or county prosecuting attorney in the name of the state upon the relation of such state attorney, county solicitor, or county prosecuting attorney.

• • • • •

(f) Every person who has possession, custody, or control of, or otherwise deals with any of the materials, matters, articles, or things described in this section, after the service upon him of a summons and complaint in an action for injunction brought under this section, is chargeable with knowledge of the contents and character thereof.

• • • • •

(10) For the purposes of this section, the test of whether or not material is obscene is: Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.